

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KENYA ROSE G.,

Plaintiff,

v.

ACTING COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. 22-cv-05597-TLF

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

Plaintiff filed this action pursuant to 42 U.S.C. § 405(g) for judicial review of defendant's denial of plaintiff's application for Title II disability insurance benefits ("DIB"). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. Dkt. 2. Plaintiff challenges the ALJ's decision finding that plaintiff was not disabled. Dkt. 4, Complaint.

I. ISSUES FOR REVIEW

A. Whether the ALJ Erred at Step Five

B. Whether the ALJ Erred in Evaluating Medical Opinion Evidence

C. Whether the ALJ Erred in Evaluating Plaintiff's Subjective Symptom
Testimony

D. Whether the Case Should Be Remanded Based on New Evidence

II. BACKGROUND

Plaintiff filed her application for a period of disability and disability insurance benefits on August 26, 2019, alleging a disability onset date of August 17, 2019. Administrative Record (“AR”) 343, 358, 464. Plaintiff remains insured through June 30, 2023. AR 23. Plaintiff’s application was denied initially and on reconsideration. AR 356, 372. Administrative Law Judge (“ALJ”) Traci Hixson held a hearing on April 15, 2021 and issued a decision on June 2, 2021 finding plaintiff not disabled from her alleged onset date through the date of the ALJ’s decision. AR 19–43, 264–302.

Plaintiff requested review of the ALJ’s decision and submitted additional evidence to the Appeals Council. See AR 1–2. The Appeals Council exhibited the additional evidence but denied plaintiff’s request, finding that the additional items of evidence “do not provide a basis for changing the Administrative Law Judge’s decision.” AR 1.

III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of Social Security benefits if the ALJ’s findings are based on legal error or not supported by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017) (internal citations omitted). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted).

The Court must consider the administrative record as a whole. *Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014). The Court also must weigh both the

evidence that supports and evidence that does not support the ALJ's conclusion. *Id.*

The Court may not affirm the decision of the ALJ for a reason upon which the ALJ did not rely. *Id.* Rather, only the reasons identified by the ALJ are considered in the scope of the Court's review. *Id.*

IV. DISCUSSION

A. Whether the ALJ Erred at Step Five

At step five of the sequential evaluation process, the ALJ has the burden of determining whether "the claimant can perform a significant number of other jobs in the national economy." *See Ford v. Saul*, 950 F.3d 1141, 1148 (9th Cir. 2020). If the claimant is not able to do so, the ALJ must find the claimant disabled. *Id.* The ALJ can meet this burden by utilizing the testimony of a vocational expert (VE). *See Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006).

"In making this determination, the ALJ relies on the [*Dictionary of Occupational Titles*], which is the SSA's 'primary source of reliable job information' regarding jobs that exist in the national economy." *Zavalin v. Colvin*, 778 F.3d 842, 845–46 (9th Cir. 2015) (citing *Terry v. Sullivan*, 903 F.2d 1273, 1276 (9th Cir.1990)). "The Social Security Administration has taken administrative notice of the *Dictionary of Occupational Titles*, which is published by the Department of Labor and gives detailed physical requirements for a variety of jobs." *Massachi v. Astrue*, 486 F.3d 1149, 1153 n. 8 (9th Cir. 2007). Thus, an ALJ errs if they rely on a VE's testimony "without first inquiring whether the testimony conflicts with the *Dictionary of Occupational Titles*." *Id.* at 1152.

Here, at step five, the ALJ relied on the VE's testimony in finding plaintiff not disabled. AR 36–37. During the hearing, the VE testified that an individual with plaintiff's

1 residual functional capacity (“RFC”) can perform the jobs of: classifier, DOT code
2 361.687-014 (57,000 positions available nationally); folder, DOT code 369.687.018,
3 (30,000 positions available nationally), and garment sorter, DOT code 222.687-014
4 (22,000 positions available nationally). See AR 291–92. The VE confirmed with the ALJ
5 that these findings were consistent with the DOT. AR 293.

6 During cross-examination, plaintiff’s counsel inquired of the VE about the
7 program the VE had used to arrive at these numbers. AR 295–299. The VE stated it
8 was a program called OccuBrowse Plus, which provides job numbers by Occupational
9 Employment Statistics (“OES”) groups, rather than by individual DOT codes (though the
10 VE confirmed that each OES group contains several individual DOT codes). See AR
11 295–296. The VE further explained that to calculate job number estimates, the VE
12 multiplied the total number by 10 percent (for example the estimated OES group
13 employment for final assembler of eyeglasses and sunglasses was 222,000 and the VE
14 multiplied by 10 percent to arrive at 22,000 jobs for the individual DOT code), a method,
15 which, according to the VE, is “based on [his] experience with this position.” AR 295–
16 296.

17 Plaintiff’s counsel then asked the VE if he was familiar with the program Job
18 Browser Pro. AR 296. The VE confirmed that he was, but stated he preferred
19 OccuBrowse Plus because the results from JobBrowser Pro did not seem “practical,”
20 though the VE acknowledged that the latter program is a source “used and recognized”
21 by other VEs and the government. See AR 296.

22 Plaintiff first contends the ALJ erred in relying on the VE’s testimony without
23 analyzing the VE’s methodology. Dkt. 10 at 4–5. Specifically, plaintiff takes issue with
24
25

1 the fact that OccuBrowse Plus did not provide numbers by individual DOT codes, that
2 the VE did not explain why he took 10 percent of the number of jobs available under
3 each OES group, and the VE's refusal to use Job Browser Pro. *Id.*

4 The Court recognizes that, "a VE's testimony is one type of job information that is
5 regarded as inherently reliable; thus, there is no need for an ALJ to assess its
6 reliability." *Buck v. Berryhill*, 869 F.3d 1040, 1051 (9th Cir. 2017). "[A] qualified
7 vocational expert's testimony as to the number of jobs existing in the national economy
8 that a claimant can perform is ordinarily sufficient by itself to support an ALJ's step-five
9 finding." *See Kilpatrick v. Kijakazi*, 35 F.4th 1187, 1192 (9th Cir. 2022). But the Ninth
10 Circuit has also recognized that a VE's testimony "is not incontestable." *See Buck*, 869
11 F.3d at 1051–52. For example, when there is "any apparent conflict between the VE's
12 testimony and the DOT, regardless of whether a claimant raises the conflict before the
13 agency," the ALJ is "required to investigate and resolve" that conflict. *See Shaibi v.*
14 *Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017).

15 In this case, however, the VE confirmed with the ALJ that his testimony was
16 consistent with the DOT. *See* AR 293. Additionally, even though OccuBrowse Pro
17 produces job numbers by OES groups, as plaintiff's counsel states, each group contains
18 "many different DOT codes," therefore the Court cannot say the VE's testimony conflicts
19 with the DOT. AR 295–96. *See Rashidi v. Kijakazi*, No. 22-55121, 2022 WL 17974638,
20 at *2 (9th Cir. Dec. 28, 2022) (finding the ALJ did not err when the ALJ overruled the
21 claimant's objection to the VE's testimony after "determin[ing] that the vocational
22 expert's testimony [wa]s consistent with the information contained in the Dictionary of
23 Occupational Titles.")

1 As to plaintiff's argument contesting the VE's method of taking ten percent of the
2 job numbers from each OES group, and challenging the VE's decision to use
3 OccuBrowse instead of Job Browser Pro, the Ninth Circuit has observed that "VEs may
4 use a wide range of data sources and methodologies to generate job-number
5 estimates." *White v. Kijakazi*, 44 F.4th 828, 834 (9th Cir. 2022) ("there is no requirement
6 that a VE disclose the primary data underlying the estimates prior to, during, or after the
7 hearing"). In support of her argument, plaintiff cites to two cases, but neither are
8 persuasive—one is concurrence from an out-of-circuit opinion, while the other concerns
9 a VE using a different grouping called the Standard Occupational code. See Dkt. 10 at
10 4–5.

11 Further, other courts in this circuit have found no error when a VE uses OES
12 groups to determine job numbers. See *Wright v. Colvin*, No. CV 12-1893-SP, 2014 WL
13 5456044, at *5 (C.D. Cal. Oct. 27, 2014), *aff'd sub nom. Wright v. Berryhill*, 692 F. App'x
14 496 (9th Cir. 2017) (finding no error with VE's use of OES group as "a starting point"
15 because VE did not exclusive rely on software's raw numbers, but further relied on her
16 expertise to determine numbers of jobs available based on claimant's skills); see *also*
17 *Tamara L. v. Comm'r, Soc. Sec. Admin.*, No. 6:20-CV-01601-MC, 2022 WL 898201, at
18 *3 (D. Or. Mar. 28, 2022) (finding no error with ALJ's reliance on VE's job numbers
19 based on OES groups); *Mae v. Saul*, No. 1:19-CV-03061-MKD, 2020 WL 3620092, at
20 *14 (E.D. Wash. Mar. 6, 2020) (finding the ALJ reasonably relied on VE's method of
21 "whittling down the numbers from the OES group" because of VE's expertise and clear
22 account of methodology).

23 Plaintiff next contends the ALJ erred for failing to consider the alternative job
24
25

1 numbers provided by her counsel. Dkt. 10 at 5.

2 After the hearing, plaintiff's counsel submitted to the ALJ a report of the number
3 of available positions, nationally and in the state of Washington, for the jobs of classifier,
4 folder, and garment sorter using the same DOT codes provided by the VE during the
5 hearing. AR 36, 595–605. The report, created using JobBrowser Pro, showed there are:
6 81 positions available nationally and 8 positions available statewide for the job of
7 classifier; 130 positions available nationally and 1 positions statewide for the job of
8 folder; and 248 positions available nationally and 2 positions statewide for the job of
9 garment sorter. AR 601–604. The ALJ considered the report but relied on the VE's
10 findings instead because "of the vocational expert's qualifications and expertise in
11 extrapolating data about various jobs." AR 37.

12 When there is "vast discrepancy between the VE's job numbers and those
13 tendered by the [claimant], presumably from the same source, is simply too striking to
14 be ignored," the ALJ must address this inconsistency. *See Buck v. Berryhill*, 869 F.3d
15 1040, 1052 (9th Cir. 2017). But an "ALJ [is required] to consider competing job numbers
16 only if they constitute significant probative evidence." *Kilpatrick v. Kijakazi*, 35 F.4th
17 1187, 1194 (9th Cir. 2022).

18 Plaintiff relies on *White v. Kijakazi*, 44 F.4th 828, 836–37 (9th Cir. 2022), where
19 the Ninth Circuit remanded after finding the job estimates provided by claimant's
20 counsel, who used the same methodology as the VE, "significant and probative." In
21 *White*, the VE used SkillTRAN—though it is unclear what specific program—while
22 claimant's counsel used JobBrowser Pro in providing drastically lower numbers
23 estimates. *See id.* at 838. But in considering whether competing numbers are
24
25

1 “significant and probative,” several Ninth Circuit cases have focused on similar
2 methodologies and “identified expertise.” See *Kilpatrick*, 35 F.4th at 1194; *Kremlingson*
3 *v. Saul*, 800 F. App’x 531, 532–33 (9th Cir. 2020) (finding data and analysis provided by
4 claimant “insufficient to preclude the agency from relying on the vocational expert’s
5 testimony” because claimant “failed to support [challenge to VE’s testimony] with any
6 expert analysis or declaration” and instead provided “only her lay interpretation”);
7 *Rashidi v. Kijakazi*, No. 22-55121, 2022 WL 17974638, at *2 (9th Cir. Dec. 28, 2022)
8 (finding job numbers provided by claimant’s counsel “did not constitute significant
9 probative evidence” because counsel did not “explain where the specific estimated
10 numbers come from, how they were derived, or by whom”).

11 In this case, the VE and plaintiff’s counsel used different programs—the VE used
12 OccuBrowse, while plaintiff’s counsel used JobBrowser Pro. AR 36, 295–96, 595–605.
13 To the extent that plaintiff argues the programs are the same because they are both
14 owned by SkillTRAN, plaintiff is still unable to show the same methodology was used
15 because the VE did not simply rely on the numbers produced by the program. As
16 explained, the VE employed a method based on his expertise to arrive at his findings.
17 See AR 296.

18 Plaintiff also has not shown that her counsel produced evidence from an expert
19 who had an “identified expertise in calculating job figures in the national economy.” See
20 *Kilpatrick*, 35 F.4th at 1194. Further, it is unclear from the record exactly how plaintiff’s
21 counsel produced their findings. Although the report from JobBrowser Pro does show
22 job numbers by individual DOT code, the cover letter only briefly states that the
23 numbers are “directly from Job Browser Pro” and is absent of any explanations of
24
25

1 plaintiff's counsel's methodology. See AR 595–96. The cover letter also highlights
2 JobBrowser Pro's reliability as a source, and cites to an internal Social Security memo
3 listing JobBrowser Pro as an "acceptable" program; yet the same memo lists
4 OccuBrowse Pro as being acceptable as well. See AR 595.

5 Plaintiff has failed to show that the job results submitted by her counsel were
6 "significant probative evidence," therefore the Court finds the ALJ did not err in relying
7 on this data at step five. See *Kilpatrick v. Kijakazi*, 35 F.4th 1187, 1194 (9th Cir. 2022).

8 B. Whether the ALJ Erred in Evaluating Medical Opinion Evidence

9 Plaintiff assigns error to the ALJ's evaluation of the medical opinion of (1) Dr.
10 Hamilton, and contends the ALJ erred in finding the opinions of (2) Dr. Haney and Dr.
11 Donahue, and (3) Dr. Alto and Dr. Hander persuasive. Dkt. 10 at 6–10.

12 Plaintiff filed her applications after March 27, 2017. AR 343, 358, 464. Under the
13 regulations applicable to this case, ALJs must consider every medical opinion in the
14 record and evaluate each opinion's persuasiveness, with the two most important factors
15 being "supportability" and "consistency." *Woods v. Kijakazi*, 32 F.4th 785, 791 (9th Cir.
16 2022); 20 C.F.R. §§ 404.1520c(a). Supportability concerns how a medical source
17 supports a medical opinion with relevant evidence, while consistency concerns how a
18 medical opinion is consistent with other evidence from medical and nonmedical
19 sources. See *id.*; 20 C.F.R. § 404.1520c(c)(1), (c)(2). Under the new regulations, "an
20 ALJ cannot reject an examining or treating doctor's opinion as unsupported or
21 inconsistent without providing an explanation supported by substantial evidence."
22 *Woods*, 32 F.4th at 792.

1 1. Dr. Hamilton

2 In February 2017, Dr. Andrew Hamilton completed an evaluation of plaintiff's
3 condition, and opined that based on plaintiff's fibromyalgia, post-traumatic stress
4 disorder ("PTSD"), anxiety, and depression, plaintiff is limited in her ability to work. See
5 AR 1252. Dr. Hamilton described that when plaintiff's fibromyalgia's symptoms are
6 severe, plaintiff is "advised to avoid heavy lifting/pushing/pulling > 15lbs and to take
7 frequent breaks to rest muscles." *Id.* When asked about plaintiff's limitations with lifting
8 and carrying, Dr. Hamilton checked a box that plaintiff is limited to "sedentary work,"
9 defined, in pertinent part, in the form as "Able to lift 10 pounds maximum and frequently
10 lift or carry such articles as files and small tools." AR 1253.

11 The ALJ discounted Dr. Hamilton's opinion because it was (1) provided prior to
12 plaintiff's alleged onset date, and (2) unsupported by his own findings.¹ AR 34–35.

13 With respect to the ALJ's first reason, though medical opinions issued before a
14 claimant's onset date are of "limited relevance," *Carmickle v. Comm'r, Social Sec.*
15 *Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008), the ALJ must still consider all opinion
16 evidence. See *Williams v. Astrue*, 493 F. App'x 866, 868 (9th Cir. 2012) (finding that
17 ALJ erred in failing to consider medical opinions predating claimant's alleged onset
18 disability). See also 20 C.F.R. § 416.920(c) ("we will articulate in our determination or
19 decision how persuasive we find *all* of the medical opinions and all of the prior
20 administrative medical findings in your case record") (emphasis added). That Dr.
21 Hamilton's opinion was rendered before plaintiff's alleged onset date is not a legally

22 ¹ The ALJ stated Dr. Hamilton's opinion included "internal inconsistencies," but the Court construes this
23 as an evaluation of Dr. Hamilton's opinion's supportability because the ALJ referred to the "supporting
24 explanations presented" by Dr. Hamilton himself in discounting it. See 20 C.F.R. § 404.1520c(c)(1); AR
25 35.

1 valid reason to discount it, thus the ALJ erred in doing so.

2 With respect to the ALJ's second reason, the more "relevant the objective
3 medical evidence and supporting explanations presented by a medical source are to
4 support his or her medical opinion(s)," the more persuasive it is. See 20 C.F.R. §
5 404.1520c(c)(1). Here, the ALJ explained that while Dr. Hamilton wrote that plaintiff is
6 advised to limit lifting, pushing, and pulling anything that is more than 15 pounds, Dr.
7 Hamilton also indicated in the same form that plaintiff is limited to lifting only 10 pounds
8 maximum. See AR 1252–53. The inconsistency identified by the ALJ is supported by
9 the record, therefore the Court cannot say the ALJ erred in discounting Dr. Hamilton's
10 opinion based on its internal inconsistencies. See *Batson v. Comm'r Soc. Sec. Admin.*,
11 359 F.3d 1190, 1198 (9th Cir. 2004) (explaining that where the evidence is susceptible
12 to more than one rational interpretation, the Court must uphold the ALJ's findings).
13 Further, because this is a valid reason, other alleged errors in the ALJ's reasoning
14 would be harmless. See *Carmickle*, 533 F.3d at 1162 (9th Cir. 2008) (including an
15 erroneous reason among other is at most harmless error where an ALJ provides other
16 reasons that are supported by substantial evidence).

17 However, new evidence submitted to the Appeals Council after the ALJ issued a
18 decision indicates this finding by the ALJ may not be supported by substantial evidence,
19 as further discussed below. See, *infra*, Section IV.D.

20 2. Dr. Haney and Dr. Donahue

21 Dr. Haney evaluated plaintiff at the initial level by reviewing her records in
22 February 2020 and opined that plaintiff was at most moderately limited in her
23 understanding and memory limitations, sustained concentration and persistence
24
25

1 limitations, and social interaction limitations. AR 353–56. At the reconsideration stage,
2 Dr. Robert Hander provided similar opinions regarding plaintiff’s mental functioning. AR
3 368–70.

4 The ALJ found their opinions persuasive, discussing throughout the decision that
5 they were consistent with (1) plaintiff’s medical record, (2) plaintiff’s activities, and (3)
6 plaintiff’s high school education. *See Kaufmann v. Kijakazi*, 32 F.4th 843, 851 (9th Cir.
7 2022) (finding that a court “clearly err[s] by overlooking the ALJ’s full explanation”); AR
8 27–33.

9 With respect to the ALJ’s first reason, the more consistent a medical opinion is
10 “with the evidence from other medical sources and nonmedical sources in the claim,”
11 the more persuasive is the medical opinion. *See* 20 C.F.R. § 404.1520c(c)(2). Here, the
12 ALJ specifically pointed out that no medical source has found plaintiff with marked or
13 extreme mental limitations. AR 27–29, 32. The ALJ also explained that plaintiff’s record
14 includes reports of normal memory and concentration. AR 823, 864, 1216, 1269, 1346,
15 1349 1359–60, 1365–66, 1386, 1392–93, 1398. Additionally, plaintiff was able to
16 interact with her medical providers and often reported as alert and oriented. *See* AR
17 864, 906, 1216, 1269, 1346, 1349, 1359–60, 1365–66, 1386–87, 1392–93, 1398–99.
18 The ALJ’s finding is supported by the record, therefore the ALJ could reasonably find
19 the medical opinions of Dr. Haney and Dr. Donahue persuasive based on their
20 consistency with plaintiff’s medical record.

21 The ALJ’s other reasons are not as convincing. For example, the ALJ does not
22 explain how plaintiff’s high school education or her ability to drive, take care of her child,
23 and do household chores necessarily supports the doctors’ findings about her mental
24
25

1 limitations in a work setting. Thus, the Court cannot say these were reasonable bases
2 for finding the medical opinions of Dr. Haney and Dr. Donahue persuasive. However,
3 because the ALJ provided at least one valid reason, supported by substantial evidence,
4 in finding their opinions persuasive, any erroneous reason provided is deemed
5 harmless. *See Carmickle*, 533 F.3d at 1162 (9th Cir. 2008).

6 3. Dr. Alto and Dr. Hander

7 Dr. Alto reviewed plaintiff's records in February 2020 at the initial level and
8 opined that plaintiff can occasionally lift and/or carry 20 pounds; frequently lift and/or
9 carry 10 pounds; stand and/or walk for a total of six hours in an eight-hour workday; sit
10 for six hours in an eight-hour workday; and push and or/pull. AR 351. Dr. Alto also
11 opined that plaintiff can frequently climb ramps/stairs, occasionally climb
12 ladders/ropes/scaffolds, can balance, and can frequently stoop, kneel, crouch, and
13 crawl. AR 352. At the reconsideration stage, Dr. Hander provided similar opinions about
14 plaintiff's physical functioning. AR 367–68.

15 The ALJ found both opinions persuasive, explaining throughout the decision that
16 (1) they are “experts in Social Security disability programs,” and (2) their opinions are
17 consistent with plaintiff's medical record. *See* AR 26, 34–35.

18 With respect to the ALJ's first reason, “evidence showing a medical source has
19 familiarity with the other evidence in the claim or an understanding of our disability
20 program's policies and evidentiary requirements” is a factor the ALJ may considering
21 when evaluating a medical opinion. *See* 20 C.F.R. § 404.1520c(c)(5). However, the
22 regulations make it clear that a medical opinion's supportability and consistency are “the
23 most important factors” an ALJ must consider. *See* 20 C.F.R. § 404.1520c(a). Thus, Dr.
24
25

1 Alto's and Dr. Hander's expertise in Social Security rules is not in itself determinative of
2 whether the ALJ properly evaluated their medical opinions.

3 With respect to the ALJ's second reason, the more consistent a medical opinion
4 is "with the evidence from other medical sources and nonmedical sources in the claim,"
5 the more persuasive it is. See 20 C.F.R. § 404.1520c(c)(2). Here, the ALJ found that
6 plaintiff's record indicates she did not have problems with walking, balancing, and lifting,
7 and that she had normal muscle strength. AR 33–34 (citing AR 691–92, 1040, 1304,
8 1308, 1320, 1360). The ALJ also pointed out that plaintiff has had limited physical
9 therapy since her alleged onset date. AR 34. Yet the ALJ failed to account for numerous
10 treatment notes—some of which were cited by the ALJ—that also show plaintiff had
11 muscle weakness, and back, neck, and extremity pain. See AR 881, 893, 908–09, 915,
12 1317–18, 1320, 1387, 1462, 1493, 1497. Plaintiff also engaged in physical therapy after
13 her alleged onset date. AR 892, 908. Given these contrasting treatment notes, the Court
14 cannot say the ALJ properly evaluated the medical opinions of Dr. Alto and Dr. Hander
15 based on their consistency with the rest of plaintiff's record. Accordingly, the Court finds
16 the ALJ erred.

17 An error that is inconsequential to the non-disability determination is harmless.
18 *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006)). But if the
19 errors of the ALJ result in a residual functional capacity (RFC) that does not include
20 relevant work-related limitations, the RFC is deficient and the error is not harmless. *Id.*;
21 *see also Carmickle v. Comm'r, Social Sec. Admin.*, 533 F.3d 1155, 1160 (9th Cir. 2008);
22 *Embrey v. Bowen*, 849 F.2d 418, 422–423 (9th Cir. 1988); *Stramol-Spirz v. Saul*, 848
23 Fed. Appx. 715, 718 (9th Cir. 2021) (unpublished). The ALJ's error here is not harmless,
24
25

1 because had the ALJ properly evaluated the medical opinions of Dr. Alto and Dr.
2 Hander, this would potentially result in a different RFC and would potentially change the
3 ALJ's determination of nondisability.

4 C. Whether the ALJ Erred in Evaluating Plaintiff's Subjective Symptom
5 Testimony

6 Plaintiff testified she is unable to work because of her mental health impairments,
7 such as anxiety, depression, and panic attacks. AR 275. She explained her panic
8 attacks are triggered by reading, talking, and being around people. AR 280. As for
9 treatments, plaintiff stated she attends therapy sessions and takes medication. AR 277–
10 78. Plaintiff also testified to having fibromyalgia and osteoarthritis. AR 276. She stated
11 her treatments for her physical impairments include physical therapy, acupuncture,
12 medication, and injections for her lower back, though she explained that the injections
13 are only helpful for two days. AR 276–278.

14 Plaintiff testified she is able to lift at most 15 pounds, can stand and walk for 30
15 minutes before she has to sit down, and can only sit for 20 to 30 minutes. AR 280–81.
16 She explained she has difficulty holding onto objects because her hands go numb. AR
17 281. She stated she can reach in front of her and overhead and get down on her knees,
18 though she finds it painful. AR 281. She also stated she cannot walk up and down the
19 stairs or crawl, and has trouble remembering things, such as names of people, places,
20 and words. AR 282.

21 As for her daily activities, plaintiff testified she is able to prepare microwaveable
22 meals, wash dishes, do laundry, and shop, though she tries to limit her shopping at
23 night. AR 269–71. Plaintiff also takes care of her daughter, but she stated that when she
24
25

1 is “having a bad day,” her parents take care of her daughter so she can rest. See AR
2 271.

3 The ALJ’s determinations regarding a claimant’s statements about limitations
4 “must be supported by specific, cogent reasons.” *Reddick v. Chater*, 157 F.3d 715, 722
5 (9th Cir. 1998) (*citing Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990)). In
6 assessing a plaintiff’s credibility, the ALJ must determine whether plaintiff has presented
7 objective medical evidence of an underlying impairment. If such evidence is present and
8 there is no evidence of malingering, then the ALJ may only reject plaintiff’s statements
9 about severity of symptoms if the ALJ provides specific, clear and convincing reasons.
10 *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (*citing Lingenfelter v. Astrue*, 504
11 F.3d 1028, 1036 (9th Cir. 2007)). The clear and convincing “standard isn’t whether our
12 court is convinced, but instead whether the ALJ’s rationale is clear enough that it has
13 the power to convince.” *Smartt v. Kijakazi*, 53 F.4th 489, 499 (9th Cir. 2022).

14 Here, the ALJ discounted plaintiff’s testimony about her mental and physical
15 functioning, finding her “statements concerning the intensity, persistence and limiting
16 effects” of her impairments “not supported by the weight of the evidence.” AR 31.

17 1. Mental Health Symptoms

18 a. Hallucinations, Anxiety, and Depression

19 In discounting plaintiff’s mental health symptoms, the ALJ first explained that
20 plaintiff has not complained of any hallucinations since her alleged onset date, and
21 there is “scant evidence of depression and anxiety.” AR 31. These are not valid
22 reasons, as they are not supported by substantial evidence. Plaintiff did not testify to
23 having any hallucinations during the hearing, and the record shows many instances
24
25

1 where plaintiff was observed as anxious and depressed, or displaying depressive
2 symptoms, after plaintiff's alleged onset date. See AR 823–24 (evaluation stating her
3 reading difficulties “are likely worsened by [plaintiff's] anxiety”), 863 (“very anxious
4 during the exam,” “she endorsed moderate anxiety and severe depression symptoms”),
5 1211–15, 1197–98, 1206, 1214–16, 1223, 1337, 1652. Thus, in discounting this portion
6 of plaintiff's testimony for these reasons, the ALJ erred.

7 b. Ability to Understand, Memory, Concentration, Pace, and Persistence

8 The ALJ next discounted plaintiff's testimony regarding her ability to understand,
9 remember, and apply information, as well as her ability to concentrate, persist, and
10 pace, based on their inconsistencies with plaintiff's medical record. AR 31–32.

11 “Contradiction with the medical record is a sufficient basis for rejecting the claimant's
12 subjective testimony.” *Carmickle*, 533 F.3d at 1161. Here, the ALJ pointed out that since
13 plaintiff's alleged onset date, no medical source found her with extreme or marked
14 limitations with her ability to understand, remember, or apply information. AR 31. In
15 support of this finding, the ALJ highlighted Dr. Fritch's neuropsychological evaluation in
16 November 2019. See AR 31, 1733.

17 But Dr. Fritch's evaluation *supports* plaintiff's testimony—it shows that plaintiff's
18 processing speed, working memory, verbal and reading comprehension, perceptual
19 reasoning, auditory memory, oral reading fluency, and spelling, were either low or below
20 average. See AR 1773. Thus, based on the findings of Dr. Fritch alone, the ALJ erred in
21 discounting this portion of plaintiff's testimony.

22 However, the ALJ also highlighted other treatment notes in plaintiff's record. AR
23 32. For example, the cited evidence shows plaintiff presented alert and oriented, and
24
25

1 was repeatedly found to have no memory problems, intact memory, and having normal
2 concentration and attention. See AR 864, 906, 1216, 1269, 1346, 1349, 1359–60,
3 1365–66, 1386–87, 1392–93, 1398–99. Given these findings, the ALJ could reasonably
4 discount this portion of plaintiff’s testimony.

5 The ALJ also found plaintiff’s ability to drive, take care of her daughter, live
6 independently, attend her medical appointments, cook, clean, shop, manage money,
7 and watch movies inconsistent with plaintiff’s testimony regarding her ability to
8 understand, remember, and apply information. AR 31. An ALJ may reject a plaintiff’s
9 symptom testimony based on her daily activities if they contradict her testimony or
10 “meet the threshold for transferable work skills.” *Orn v. Astrue*, 495 F.3d 625, 639 (9th
11 Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). None of the
12 activities listed by the ALJ contradict plaintiff’s testimony, and the ALJ does not explain
13 how plaintiff’s ability to perform these daily activities necessarily shows she is able to
14 work. Thus, in discounting this portion of plaintiff’s testimony based on her daily
15 activities, the ALJ also erred. This error is harmless, however, because the ALJ has
16 provided at least one valid reason, supported by substantial evidence, in discounting
17 this portion of plaintiff’s testimony. See *Carmickle*, 533 F.3d at 1162 (9th Cir. 2008).

18 c. Ability to Interact

19 In discounting plaintiff’s testimony regarding her difficulties being around others,
20 the ALJ highlighted plaintiff’s ability to interact adequately with her medical providers,
21 shop, and patronize restaurants. AR 32. But again, none of these activities contradict
22 with plaintiff’s testimony—plaintiff admitted that while she did not like being around
23 others, she is able to shop but preferred doing so at night. AR 271, 515. Thus, in
24
25

discounting this portion of plaintiff's testimony, the ALJ erred. Furthermore, at most, the activities cited by the ALJ reflect the basic elements of living a normal life, and do not supply a reasonable basis for discrediting plaintiff. See *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001) ("[T]he mere fact that a plaintiff has carried on certain daily activities, such as grocery shopping, driving a car, or limited walking for exercise, does not in any way detract from her credibility as to her overall disability. One does not need to be 'utterly incapacitated' in order to be disabled.") (quoting *Fair*, 885 F.2d at 603); *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) ("[D]isability claimants should not be penalized for attempting to lead normal lives in the face of their limitations.").

2. Physical Symptoms

The ALJ discounted plaintiff's testimony regarding her physical symptoms because it was inconsistent with (1) plaintiff's medical record, and (2) plaintiff's daily activities. AR 33–34.

With respect to the ALJ's first reason, as previously stated, contradiction with the medical record is a sufficient basis for rejecting the claimant's subjective testimony. *Carmickle v. Comm'r, Social Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008). Here, in discounting plaintiff's statements about her fibromyalgia, the ALJ explained that plaintiff's record only includes references to the impairment and is absent of any formal diagnosis based on a detailed physical examination. AR 34. But a lack of formal diagnosis specifically declared in plaintiff's record is not a valid reason to discount plaintiff's testimony, especially considering that fibromyalgia "is diagnosed 'entirely on the basis of patients' reports of pain and other symptoms,' and 'there are no laboratory

1 tests to confirm the diagnosis.” *Revels v. Berryhill*, 874 F.3d 648, 663 (9th Cir. 2017)
2 (quoting *Benecke v. Barnhart*, 379 F.3d 587, 590 (9th Cir. 2004)).

3 In discounting plaintiff’s statements about her pain, the ALJ also pointed to
4 plaintiff’s treatment notes showing normal muscle strength and noted a lack of
5 complaints about her difficulties with lifting, carrying, standing, walking or using her
6 upper extremities. See AR 691–92, 1304, 1308, 1320, 1360. The ALJ’s reasoning is not
7 supported by substantial evidence. Ninth Circuit precedent dictates that in cases of
8 fibromyalgia, the ALJ is recommended to consider the claimant’s longitudinal records,
9 as “symptoms of fibromyalgia ‘wax and wane,’ and a person may have ‘bad days and
10 good days.’” *Revels*, 874 F.3d at 663 (quoting Social Security Ruling (“SSR”) 12-2p).
11 Plaintiff’s record shows that while she may have full muscle strength, she also had
12 decreased range of motion, or if she had full range of motion, she had radiating pain
13 throughout her lower extremities and back, muscle weakness, and diminished sensation
14 and reflexes. See AR 797, 881–82, 886, 893, 909, 915, 1387, 1393, 1399, 1493, 1497,
15 1513. Given the varying levels of plaintiff’s reports regarding her body pain, and in light
16 of Ninth Circuit precedent regarding the unique conditions of fibromyalgia, the Court
17 cannot say the ALJ reasonably discounted plaintiff’s testimony regarding her
18 fibromyalgia. Accordingly, the Court finds the ALJ erred in discounting this portion of
19 plaintiff’s testimony.

20 3. Plaintiff’s Treatment History

21 The ALJ also discounted plaintiff’s testimony about her physical and mental
22 symptoms because of her treatment history, but provides contradicting reasons in doing
23 so. The ALJ first points out plaintiff “has been able to care for her physical and
24
25

1 emotional problems since the August 17, 2019 alleged onset date by seeking out
2 medical treatment for them,” but simultaneously discredits plaintiff’s testimony because
3 of her limited treatment history. See AR 32 (“she has not been treated emergently for a
4 mental impairment,” “the claimant has not been psychiatrically hospitalized”, 34
5 (“claimant has not been hospitalized because of a physical, or mental, impairment(s)
6 since August 17, 2019). Further, the ALJ’s finding is not supported by the record. While
7 an ALJ may reject symptom testimony “if the level or frequency of treatment is
8 inconsistent with the level of complaints,” see *Molina v. Astrue*, 674 F.3d 1104, 1113
9 (9th Cir. 2012), the record shows plaintiff engaged in both physical therapy and
10 counseling after her alleged onset date. See AR 863, 892, 908, 915, 1195–1226, 1232,
11 1351, 1372. Thus, in discounting plaintiff’s testimony for these reasons, the ALJ erred.

12 In sum, the ALJ erred in discounting certain portions of plaintiff’s testimony. While
13 substantial evidence supports the ALJ’s finding that plaintiff’s testimony regarding her
14 ability to understand, remember, apply information, concentrate, persist, and pace is
15 inconsistent with the record, the ALJ did not provide a rationale to discount the balance
16 of plaintiff’s testimony. As previously stated, an error that is inconsequential to the non-
17 disability determination is harmless. *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050,
18 1054 (9th Cir. 2006). But if the errors of the ALJ result in an RFC that does not include
19 relevant work-related limitations, the RFC is deficient and the error is not harmless. *Id.*;
20 see also *Carmickle v. Comm’r, Social Sec. Admin.*, 533 F.3d 1155, 1160 (9th Cir. 2008);
21 *Embrey v. Bowen*, 849 F.2d 418, 422-423 (9th Cir. 1988); *Stramol-Spirz v. Saul*, 848
22 Fed. Appx. 715, 718 (9th Cir. 2021) (unpublished).

23 The ALJ’s error here is not harmless, because had the ALJ properly evaluated
24
25

1 plaintiff's symptom testimony, the ALJ may have assessed a different RFC and thus
2 change the ALJ's determination on nondisability.

3 D. Whether New Evidence Submitted to the Appeals Council Undermines the
4 ALJ's Decision

5 Plaintiff contends that new evidence submitted to the Appeals Council after the
6 issuance of ALJ's decision undermines the ALJ's determination of nondisability. Dkt. 10
7 at 18–19.

8 This Court is required to evaluate this evidence to determine whether the ALJ's
9 decision is supported by substantial evidence. *Brewes v. Commissioner of Social*
10 *Security*, 682 F.3d 1157, 1160 (9th Cir. 2012) (when a claimant submits evidence for
11 the first time to the Appeals Council, which considers that evidence in denying review of
12 the ALJ's decision, the new evidence is part of the administrative record the district
13 court must consider it in determining whether the Commissioner's decision is supported
14 by substantial evidence).

15 The additional evidence includes treatment notes from Blue Spring Chiropractic
16 from January 2021 to April 2021, and treatment notes from Dr. Hamilton. AR 2, 15–16,
17 44–234. The treatment notes from Blue Spring Chiropractic show the improvement in
18 plaintiff's overall body pain were not sustainable. See AR 150 (report of radiating pain in
19 neck, upper and lower back, shoulders), 48 ("improvement since initial exam on
20 1/25/2021"), 64 (3/20 "overall symptoms are getting better since last treatment"), 53
21 (3/30 "most of her pain is still the same"). In an evaluation rendered in June 2021, Dr.
22 Hamilton opined that plaintiff would be severely limited in lifting and carrying, such that
23 she is unable to lift at least two pounds or unable to stand or walk. AR 16. The other
24
25

1 treatment notes from Dr. Hamilton show plaintiff's clinical diagnoses of fibromyalgia,
 2 chronic pain, sciatic, joint pain, anxiety, plaintiff's continued reports of chronic pain and
 3 depression, and continued prescription of medication for those symptoms. See AR 170,
 4 200, 203–33.

5 The ALJ discounted Dr. Hamilton's opinion in part due to its internal
 6 inconsistencies, specifically regarding his contradictory finding about plaintiff's lifting
 7 capabilities. See, *supra*, Section IV.B.2; AR 35. In light of the new opinion rendered by
 8 Dr. Hamilton, the ALJ's evaluation of that medical opinion is no longer supported by
 9 substantial evidence. On remand, the ALJ shall evaluate this evidence.

10 E. Remedy

11 “The decision whether to remand a case for additional evidence, or simply to
 12 award benefits[,] is within the discretion of the court.” *Trevizo v. Berryhill*, 871 F.3d 664,
 13 682 (9th Cir. 2017) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). If
 14 an ALJ makes an error and the record is uncertain and ambiguous, the court should
 15 remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045
 16 (9th Cir. 2017). Likewise, if the court concludes that additional proceedings can remedy
 17 the ALJ's errors, it should remand the case for further consideration. *Revels*, 874 F.3d
 18 at 668.

19 The Ninth Circuit has developed a three-step analysis for determining when to
 20 remand for a direct award of benefits. Such remand is generally proper only where

21 “(1) the record has been fully developed and further administrative
 22 proceedings would serve no useful purpose; (2) the ALJ has failed
 23 to provide legally sufficient reasons for rejecting evidence, whether
 24 claimant testimony or medical opinion; and (3) if the improperly
 25 discredited evidence were credited as true, the ALJ would be
 required to find the claimant disabled on remand.”

The Ninth Circuit emphasized in *Leon* that even when each element is satisfied, the district court still has discretion to remand for further proceedings or for award of benefits. *Leon*, 80 F.3d at 1045.

Based on a review of the record, the Court concludes that the record is not free from important and relevant conflicts, such as conflicts in the medical evidence. Therefore, this matter should be reversed for further administrative proceedings, including a *de novo* hearing, not with a direction to award benefits. *See id.*

Based on the foregoing discussion, the Court concludes the ALJ improperly determined plaintiff to be not disabled. Therefore, the ALJ's decision is reversed and remanded for further administrative proceedings.

24

Theresa L. Fricke

Theresa L. Fricke
United States Magistrate Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25